COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

NOVEMBER, NINETEEN HUNDRED AND THIRTEEN.

NOTES.

LIFE INSURANCE POLICIES AS ASSETS OF A BANKRUPT'S ESTATE.—Among the many vexed problems arising from the interpretation of apparently conflicting provisions of the Bankruptcy Act, few have proven more perplexing than those relating to the status of life insurance policies as assets of bankrupt estates. These policies are exempted from the claims of creditors by the statutes of many states, and although § 6[1] of the Act expressly provides for the allowance

[1] § 6. Exemptions of Bankrupts.—*a.* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

of such exemptions, it was contended for some years by the courts of the Eighth and Ninth Circuits[2] that the sweeping provisions of this section were qualified by the proviso of § 70a (5),[3] and that policies having a cash surrender value, though exempt by state statutes, passed to the trustee for the benefit of creditors. This construction was rejected by the Supreme Court in *Holden* v. *Stratton*,[4] on the ground that the declarations of the proviso were subordinate to the general provisions of the Act. Even after this decision the courts, recognizing life insurance policies as a class of property freely assignable, generally assumed that the trustee took title to all policies on the bankrupt's life payable to himself, his executors or assigns,[5] subject only to the bankrupt's right of redemption of those policies having a "cash surrender value."[6] The interpretation of this phrase, however, provoked a marked diversity of opinion in the courts of the various circuits. Tribunals favoring a strict construction of the Act insisted that the power of redemption was secured to the bankrupt only when a cash surrender value was stipulated for in the policy,[7] while other courts maintained that it was sufficient that such surrender was permitted by the practice or concession of the insurance company.[8] The question was finally determined by the Supreme

---

[2]Steele *v.* Buel (C. C. A. 1900) 104 Fed. 968; *In re* Scheld (C. C. A. 1900) 104 Fed. 870.

[3]§ 70. Title to Property.—*a*. The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided,* That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets, . . .

[4](1905) 198 U. S. 202.

[5]Although the general rule is that a beneficiary's interest is vested and indefeasible, 12 COLUMBIA LAW REVIEW 552; Central Bank *v.* Hume (1888) 128 U. S. 195, the authorities are in conflict as to the right of the trustee to a policy which grants to the bankrupt unlimited power to change the beneficiary. This right has been upheld on the ground that such policies constitute transferable property of the insured, *In re* Herr (D. C. 1910) 182 Fed. 716; *In re* White (C. C. A. 1909) 174 Fed. 333, 26 L. R. A. [N. S.] 451, and note; and denied on the curious ground that such power cannot pass to the trustee under § 70a (3), since it may not be exercised by the bankrupt for his own benefit. Dissenting opinion of Pollock, J., *In re* Orear (C. C. A. 1910) 178 Fed. 632, 636; *cf. In re* Johnson (D. C. 1910) 176 Fed. 591; *In re* Orear (C. C. A. 1911) 189 Fed. 888. This question has not been passed upon by the Supreme Court, but the result reached by Pollock, J. seems clearly in accord with the solicitude of the Court for the bankrupt's dependents.

[6]*In re* Orear, *supra; In re* Slingluff (D. C. 1900) 106 Fed. 154.

[7]*In re* Mertens (D. C. 1904) 131 Fed. 972; *In re* Welling (C. C. A. 1902) 113 Fed. 189.

[8]*In re* Boardman (D. C. 1900) 103 Fed. 783; See Gould *v.* N. Y. Life Ins. Co. (D. C. 1904) 132 Fed. 927.

Court in the case of *Hiscock* v. *Mertens*,[9] in accordance with the more liberal view.

These decisions, however, left untouched the controverted question of whether, under the provisions of the Act, the trustee was vested with any interest in such policies beyond their cash surrender value at the time of the filing of the petition.[10] In the view of some courts all interests of the bankrupt answering to the broad description of transferable property pass to the trustee for the benefit of creditors.[11] As a logical result of this strict doctrine the trustee could pay the premiums on an ordinary life policy and collect its avails at maturity, or sell it for the benefit of the estate.[12] This position has been assailed upon three grounds. It is asserted that this would be purely speculation by the trustee on the life of the bankrupt,[13] in violation of the rule against wager policies.[14] But this contention is without foundation, since the rule requiring an insurable interest is generally held not to apply to a *bona fide* assignee.[15] As a second objection, it is urged that the trustee should be required, as a matter of law, to reject these policies as burdensome property, since they impose upon the estate a continuing liability, and clog its prompt settlement.[16] This stringent rule may well be applied to policies whose productivity seems remote, but should not be permitted to deprive creditors of the benefits of policies giving promise of early maturity. A sounder policy would place in the discretion of the court the power to determine upon the facts of each case the trustee's duty of rejection.[17] The most forceful argument advanced by this line of decisions is that deduced from the liberal policy of the law toward life insurance. To the minds of many courts, it seems repugnant to the protection accorded these contracts by the law[18] to place in the hands of the trustee an interest which, as a rule, would yield little to creditors, yet would deprive the bankrupt of the benefit of the low premium rate at which the insurance was effected. Upon this ground proceeded the reasoning in the recent case of *Burlingham* v. *Crouse*,[19]

---

[9](1907) 205 U. S. 202.

[10]This question becomes important when the contracts are ordinary life policies, which usually have no surrender value, or so-called "investment" policies which have not accumulated a net reserve sufficient to form the basis of surrender value.

[11]*In re* Orear, *supra; In re* Hettling (C. C. A. 1909) 175 Fed. 65.

[12]*In re* Coleman (C. C. A. 1905) 136 Fed. 818; *In re* Orear (C. C. A. 1910) 178 Fed. 632; *In re* Welling, *supra.*

[13]*In re* Judson (C. C. A. 1912) 192 Fed. 834, affirmed (1913) 228 U. S. 474; Gould *v.* N. Y. Life Ins. Co., *supra.*

[14]See Warnock *v.* Davis (1881) 104 U. S. 775; Cammack *v.* Lewis (1872) 15 Wall. 643.

[15]Grigsby *v.* Russell (1911) 222 U. S. 149; Steinback *v.* Diepenbrock (1899) 158 N. Y. 24; *contra,* Met. Life Ins. Co. *v.* Elison (1905) 72 Kan. 199, 3 L. R. A. [N. S.] 934, and note.

[16]*In re* Josephson (D. C. 1903) 121 Fed. 142; *In re* McKinney (D. C. 1883) 15 Fed. 535; Collier, Bankruptcy (9th ed.) 1027.

[17]*In re* Slingluff, *supra.*

[18]*In re* McKinney, *supra; In re* Judson, *supra.*

[19]The rule laid down in this case was applied in the cases of Everett *v.* Judson (1913) 228 U. S. 474, and Andrews *v.* Partridge (1913) 228 U. S. 479, which held that the maturity of the policy between the filing of peti-

(1913) 228 U. S. 459, which held that the trustee had no rights in policies upon which the insured bankrupt had secured loans to the full amount of their cash surrender value.

To the advocates of strict interpretation this decision may well seem a perversion of the obvious meaning of the Act. Moreover, the line of reasoning adopted by the Court of necessity forces it to find the trustee's sole grant of power in the proviso of § 70a (5), and thus give to this exception the force of additional legislation denied to it in *Holden* v. *Stratton*. But, questions of interpretation aside, the result reached in the principal case is salutary, and constitutes a notable instance of the adoption of the construction of a statute conformable to the interests of the community.

BURDEN OF PROOF IN RECOVERING PROFITS.—In an equitable action by a patentee against an infringer, it is indisputably within the power of the court to allow recovery by the complainant of all the profits accruing to the infringer through his invasion of the patentee's right.[1] Theoretically, this remedy meets the demands of justice, and there is no doubt of its practicability when the patented article or process is new, and all the profits received are due solely to the infringement. But where profits arise partially from other elements, the application of the remedy grows troublesome. For instance, if other articles or processes were available at the time the patent was appropriated, the measure of profits recoverable is the advantage gained by the use of the patented article or process as compared with such others.[2] And when the patent is for an improvement in an article or process in common use, or if the infringer used the patented article or process in connection with other elements, he is liable only for the profits derived from the use of the improvement or patented element.[3]

The question naturally arises on whom is to rest the burden of apportioning such profits. Where the patent is for an improvement the general rule is that the burden is on the complainant to prove the existence of profits, and the exact proportion of them due to his patented feature, or else to prove that the entire value or salability

---

tion and the adjudication did not affect the right of the insured's personal representative to redeem by payment of the policy's cash surrender value at the date of the filing of the petition.

[1]Though sanctioned by statute in the United States since 1870, Rev. Stat. § 4921, this remedy existed previously in equity by force of judicial decision. 3 Robinson, Patents § 1137. Profits and damages may be recovered in the same action. Fox *v.* Knickerbocker Engraving Co. (C. C. 1905) 140 Fed. 714. The existence of actual profits in a commercial sense is unnecessary to a recovery, so long as any advantage or saving has resulted from the use of the patented article or process. Cawood Patent (1876) 94 U. S. 695.

[2]Columbia Wire Co. *v.* Kokomo Steel & Wire Co. (C. C. A. 1911) 194 Fed. 108; Mowry *v.* Whitney (1871) 14 Wall. 620, 648. It has been held however, that the comparison must be between the patented invention and what was known and open to the public at and before the date of the patent. Turrill *v.* Ill. Centr. Ry. (C. C. 1880) 20 Fed. 912.

[3]Brown *v.* Lanyon Zinc Co. (C. C. A. 1910) 179 Fed. 309; Sessions *v.* Romadka (1891) 145 U. S. 29, 45; 11 COLUMBIA LAW REVIEW 74.